U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

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OCT 13 1998

In re: FERDINAND HAMMER a.k.a. Fred Hammer a.k.a. Ferko Hammer

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: William E. Bufalino, II, Esquire

ON BEHALF OF SERVICE: Lisa M. Newell
Jeffrey L. Menkin
Senior Trial Attorneys
Office of Special Investigations
Criminal Division
Department of Justice

CHARGE:

Order: Sec. 241(a)(4)(D), I&N Act [8 U.S.C. § 1251(a)(4)(D)] -
Participated in Nazi persecution

APPLICATION: Termination of proceedings

In a decision dated April 24, 1997, the Chief Immigration Judge found the respondent deportable under section 241(a)(4)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(4)(D), and ordered him deported from the United States to Croatia. The respondent has appealed. The appeal will be dismissed. The request for oral argument is denied. See 8 C.F.R. § 3.1(e) (1998).

I. PROCEDURAL HISTORY

The respondent is a 77-year-old ethnic German ("Volksdeutscher") and native of Croatia who was admitted to the United States on August 6, 1955, as a Yugoslav stateless person and German expellee under the Refugee Relief Act of 1953. On September 23, 1963, the respondent became a naturalized citizen of the United States.

A. Denaturalization

Subsequently, the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of Michigan, alleging that he had procured his citizenship by concealing or willfully misrepresenting his wartime service as an armed guard

in the Waffen SS Totenkopfsturmbann ("Death's Head Battalion")[1] at the Auschwitz concentration camp in Nazi-occupied Poland and at the Sachsenhausen concentration camp in Germany, as well as on transports of prisoners between concentration camps. At a 4-day trial that commenced on May 16, 1996, the Government presented the following documents to prove its allegations regarding the respondent's wartime service: a certified copy of a Supreme Headquarters Allied Expeditionary Force (SHAEF) card, describing the respondent as an SS Sturmmann[2] assigned to the 1st Company of the SS Totenkopfsturmbann Auschwitz as of December 7, 1944; a certified copy of a transfer list of prisoner escorts from Auschwitz to Sachsenhausen,[3] dated February 15, 1945, which includes the respondent's name and rank; and multiple certified copies of a transfer list of prisoner escorts from Sachsenhausen to the Mauthausen concentration camp in Austria, dated February 13, 1945, showing the respondent's name, rank, and date of birth.

The Government also presented, inter alia, the testimony of an expert witness, Dr. Charles W. Sydnor, a historian of Nazi Germany, including the Waffen SS and the concentration camp system. Dr. Sydnor identified the SHAEF card as a document created by a United States Army specialist based on an examination of captured SS records following the surrender of Nazi Germany in May 1945.[4] Dr. Sydnor identified the February 15, 1945, transfer list as a document taken from the archives of the state museum in Auschwitz that originated from the liaison office of the Auschwitz concentration camp 2 to 3 weeks after Auschwitz was evacuated. He explained that after the evacuation of Auschwitz in January 1945, the liaison office compiled, for record-keeping purposes, lists of the SS personnel that had been transferred elsewhere in the west as the Russian Army approached the camp from the east. The February 13, 1945, transfer list, on the other hand, copies of which were taken from various sources, including the archives of the Russian Federation, is a personnel document from the office of the SS Death's Head Battalion at Sachsenhausen. It indicates that many of the named individuals, including the respondent, had come from Auschwitz as SS guards and, on the date of the list, February 13, 1945, were being assigned to escort a transport of prisoners from Sachsenhausen to the concentration camp at Mauthausen. The document further indicates that from Mauthausen, the guards were to be transferred to the Flossenbürg concentration camp.

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[1] "SS" is the acronym for "Schutzstaffel," or protection squad. It developed into the elite guard of the Nazi dictatorship. After the outbreak of war in 1939, the "Waffen SS," or armed SS, was formally created as the militarized branch of the SS. The Waffen SS included the Death's Head Battalions, previously known as the Death's Head Units, which guarded the various concentration camps.

[2] The rank of Sturmmann is roughly the equivalent of lance corporal.

[3] The list actually refers to Oranienburg, the location of the Sachsenhausen concentration camp.

[4] According to Dr. Sydnor, such records were used to conduct background investigations of applicants for immigrant visas during the period in which the Displaced Persons Act of 1948 ("DPA") was in effect. As noted above, the respondent immigrated to the United States under the Refugee Relief Act of 1953.

In addition, the respondent was called as a witness by the Government and in his own defense. He admitted that he was a Sturmmann in the Waffen SS and, thus, was armed, but he denied that he ever served at a concentration camp or on prisoner transports between concentration camps. Rather, he claimed that, despite the hearing problems he had developed as a child and his lack of proficiency in the German language, he was conscripted by the Germans in October 1942 and was ultimately assigned to a combat division on the Russian front. Nevertheless, when shown the transfer list of prisoner escorts from Auschwitz to Sachsenhausen, he conceded that it includes his name and rank. Moreover, he could offer no explanation for why his name, rank, and date of birth appear on the transfer list of prisoner escorts from Sachsenhausen to Mauthausen.

On June 21, 1996, the district court entered an order revoking the respondent's citizenship and cancelling his certificate of naturalization. United States v. Hammer, No. 94 Civ. 74985 (E.D. Mich. June 21, 1996). In its decision, the district court's findings of fact included the following: "[a]ll three documents relied on by the [G]overnment to prove [the respondent's] service during World War II as an armed SS Death's Head Battalion guard at concentration camps established and operated by forces of the Nazi Government of Germany and on prisoner transports are authentic and reliable"; Dr. Sydnor's testimony, unlike the respondent's testimony, was credible; and "[h]orrible mistreatment" was inflicted upon the prisoners of the concentration camps. Id. Based on its findings and the evidence presented by the Government, the district court found that the Government carried its burden of proving that the respondent "was a guard at the Auschwitz and Sachsenhausen concentration camps for some period of time." Id. The district court concluded as a matter of law that, in view of the "horrible activities occurring in these concentration camps and during the transports and evacuations," the respondent's misrepresentations in his application for naturalization regarding "his service as a guard at Auschwitz or on prisoner transports were material and would very likely have affected the decision to grant citizenship." Id. The district court's decision became final upon expiration of the appeal period.

B. Proceedings Before the Chief Immigration Judge

On October 31, 1996, the respondent was served with an Order to Show Cause charging him with deportability under section 241(a)(4)(D) of the Act as an alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion. The respondent was charged under section 241(a)(4)(D) of the Act, which is also known as the "Holtzman Amendment," on three bases: (1) his alleged service as an armed guard at the Auschwitz concentration camp; (2) his alleged service as a prisoner escort on the transport from Auschwitz to the Sachsenhausen concentration camp; and (3) his alleged service as an armed guard at Sachsenhausen. According to the Chief Immigration Judge's decision, a master calendar hearing was held on February 3, 1997, at which the respondent denied the factual allegations and the charge of deportability contained in the Order to Show Cause. The respondent also declined to designate a country of deportation, which led to the designation of Croatia.

In joint pre-hearing statements filed with the Immigration Court on February 26, 1997, and March 10, 1997, respectively, the parties stipulated to facts relating to the respondent's identity and immigration history, including the revocation of his citizenship. In addition, the parties stipulated that, no later than December 7, 1944, the respondent became a guard in the 1st Company of the SS Death's Head Battalion at the Auschwitz concentration camp, but the respondent later changed his plea and denied this allegation. The parties were unable to agree to allegations relating to the respondent's activities as a member of the SS Death's Head Battalion, including his alleged service as an armed guard of prisoners at Auschwitz and Sachsenhausen and as a prisoner escort on transports between the camps. The respondent also contested that prisoners were subjected to persecutory treatment at Auschwitz and Sachsenhausen and on the transports.

To sustain its charge of deportability, the Government indicated that it would rely on the stipulations, the transcript of the denaturalization proceeding, and the documents admitted into evidence at the denaturalization proceeding. The respondent, in turn, challenged the constitutionality of the Holtzman Amendment and incorporated the "Special and Affirmative Defenses" set forth in his initial written pleading to the Order to Show Cause. The "Special and Affirmative Defenses" included objections to the testimonial and documentary evidence from the denaturalization proceeding.

Following a merits hearing on March 17, 1997, the Chief Immigration Judge rendered his decision finding the respondent deportable as charged and ordering him deported from the United States to Croatia. The Chief Immigration Judge based his finding of deportability on the facts determined by the denaturalization judgment through the application of the doctrine of collateral estoppel, as well as on an independent review of the evidence presented by the Government. In reaching his conclusion, the Chief Immigration Judge found that the evidence presented by the respondent was of insufficient probative value to rebut the case against him, in part because his testimony at the hearing was not credible. The Chief Immigration Judge also rejected the respondent's "Special and Affirmative Defenses."

II. PRIMARY ISSUE ON APPEAL

The respondent's arguments on appeal are confusing and difficult to follow. For instance, he advances arguments that do not pertain to the deportation proceedings now before us. He also appears to quote or paraphrase, with or without attribution, from circuit court and Board decisions that do not necessarily support his case.[5] At the same time, although he never actually cites to Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991), it is apparent that he relies on this decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction his case arises. As discussed more fully below, the court in Petkiewytsch v. INS, supra, held that an alien was not deportable under the Holtzman Amendment where he served involuntarily as a camp civilian guard and never personally abused prisoners.

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[5] For its part, the Government inappropriately refers to an unpublished Board decision, Matter of Tittjung, A08 615 083 (BIA Aug. 13, 1997), as if it were published as Interim Decision 3327.

Therefore, for the sake of clarity, we note that we consider the primary issue before us to be whether the denaturalization judgment and/or the evidence presented from the denaturalization proceeding is sufficient to meet the Government's burden of establishing that the respondent assisted in persecution for purposes of the Holtzman Amendment. In addressing this issue, however, we must first examine the doctrine of collateral estoppel and its applicability in deportation proceedings.

III. DOCTRINE OF COLLATERAL ESTOPPEL

The Sixth Circuit has enunciated four criteria that must be satisfied for the doctrine of collateral estoppel to apply:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
(2) determination of the issue must have been necessary to the outcome of the prior proceeding;
(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Detroit Police Officers Ass'n v. Young, 824 F.2d 512, 515 (6th Cir. 1987). Provided these four criteria are met, the doctrine may be invoked to preclude relitigation of both issues of law and issues of fact. United States v. Stauffer Chem. Co., 464 U.S. 575, 170-71 (1984); United States v. Mendoza, 464 U.S. 154, 158 (1984); see Montana v. United States, 440 U.S. 147, 153-54 (1979); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); Matter of Fedorenko, 19 I&N Dec. 57, 67 (BIA 1984). We note, however, that the use of collateral estoppel is unfair and, thus, inappropriate where "controlling facts or legal principles have changed significantly, or where the circumstances of the case justify an exception to general estoppel principles." Detroit Police Officers Ass'n v. Young, supra; see Matter of Fedorenko, supra.

In an apparent effort to argue against the use of collateral estoppel in deportation proceedings, the respondent borrows from a passage in Schellong v. INS, 805 F.2d 655, 658 (7th Cir. 1986), in which the United States Court of Appeals for the Seventh Circuit discussed the case of Title v. INS, 322 F.2d 21 (9th Cir. 1963). In Title v. INS, supra, at 24, the United States Court of Appeals for the Ninth Circuit held that the application of collateral estoppel had effectively deprived the alien of his right to a deportation hearing under section 242(b) of the Act, 8 U.S.C. § 1252(b). The court also found that the use of collateral estoppel in the alien's case had been unfair. Id.

However, as the respondent also appears to acknowledge, the Seventh Circuit ultimately found that the holding in Title was limited to the circumstances present in that case, where the alien "had presented no evidence at his denaturalization trial and despite a change in the applicable law was not allowed to present evidence at his deportation hearing." Schellong v. INS, supra. The court later observed:

> Given the full and fair judicial hearing to which an alien is entitled in a denaturalization proceeding, there is no reason not to apply the doctrine of collateral estoppel in a subsequent deportation proceeding to bar the relitigation of facts actually litigated and necessarily determined in the denaturalization case.

Kairys v. INS, 981 F.2d 937, 939 (7th Cir. 1992). This Board came to the same conclusion in Matter of Fedorenko, supra, at 61-64. As there has been no change in the applicable law in this case, and we find no other circumstances to justify an exception to general estoppel principles, we consider it appropriate to give conclusive effect to the pertinent issues that were actually litigated and necessary to the final denaturalization judgment against the respondent.

IV. DEPORTABILITY

A. The Respondent's Wartime Service as an Armed Concentration Camp Guard

The respondent argues that the Chief Immigration Judge overstated the facts that were conclusively determined by the denaturalization judgment. He does not dispute that the issue of whether he was a "guard at the Auschwitz and Sachsenhausen concentration camps for some period of time" was actually litigated and necessary to the decision to revoke his citizenship. United States v. Hammer, supra. His service as a guard at Auschwitz and Sachsenhausen, where "horrible activities" occurred, was the material fact concealed or misrepresented in his naturalization application. Id. We note that, as the respondent is therefore precluded from relitigating this issue, we have disregarded his testimony at the hearing denying that he was ever a concentration camp guard. Even assuming that the respondent spent some time on the Russian front as he claims, he is estopped from contesting the fact that he also spent at least part of the war as a concentration camp guard at Auschwitz and Sachsenhausen.[6]

However, the respondent points out that the district court did not specifically find that he was an "armed" guard, though he acknowledges that the issue was actually litigated. While we do not believe that the omission was deliberate, we agree that the precise issue of whether he was an armed guard may not have been conclusively determined in the denaturalization proceeding. We find that the respondent gains very little by the district court's omission, though, because the record is replete with evidence establishing that concentration camp guards at Auschwitz and Sachsenhausen were in fact armed. The record also includes ample evidence to show that, as an SS Sturmmann, the respondent himself was armed.[7]

We recognize that the respondent continues to object to the Government's evidence against him. For instance, he describes the documentary evidence as having been "salvaged" from the archives of the former Soviet Union, notwithstanding the fact that among the identification

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[6] We also note, nevertheless, that the background information provided by Dr. Sydnor regarding the Waffen SS and the particular combat division with which the respondent claims he served fully supports the Chief Immigration Judge's adverse credibility finding against the respondent.

[7] The respondent's own testimony confirms this fact.

documents, this description pertains to only one of the copies of one of the transfer lists. Using language obviously taken from Kalejs v. INS, 10 F.3d 441, 447 (7th Cir. 1993), he contends that "we should scrap" such evidence because it is "inherently untrustworthy."

The test for admissibility of evidence in deportation proceedings is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law. See, e.g., Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990); Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988). In this case, the evidence from the denaturalization proceeding was deemed admissible in a forum in which the Federal Rules of Evidence apply. We further note that an examination of the record of a prior proceeding generally is required to determine how broadly to apply the doctrine of collateral estoppel. See United States v. Johnson, 697 F.2d 735, 739 (6th Cir. 1983). Moreover, the regulations at 8 C.F.R. § 240.46(b) (1998) provide that the Immigration Judge "may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." See Matter of D-, 20 I&N Dec. 827, 831 (BIA 1994). Thus, the Chief Immigration Judge properly admitted both the testimonial and documentary evidence from the denaturalization proceeding.

Like the district court and the Chief Immigration Judge, we accord great weight to the denaturalization evidence, particularly the SHAEF card and transfer lists, which the district court specifically found to be authentic and reliable, and Dr. Sydnor's testimony, which the district court specifically found to be credible. Indeed, as the district court's findings regarding the respondent's wartime service, including the finding of horrible mistreatment at the camps, were based on this evidence, the respondent may even be collaterally estopped from raising his objections in these proceedings.[8] Based on our own review, we find that the record of the denaturalization proceeding provides clear, unequivocal, and convincing evidence that the respondent was not just a guard at Auschwitz and Sachsenhausen, but rather an armed SS Death's Head Battalion guard who also escorted prisoners from Auschwitz to Sachsenhausen and from Sachsenhausen to Mauthausen. See generally United States v. Stelmokas, 100 F.3d 302 (3d Cir. 1996) (finding ancient documents sufficient to establish that the defendant was a member of an armed group that assisted the Nazis in the persecution of Jews and other unarmed civilians in Lithuania); United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986) (finding that a properly authenticated SS identity card established that the defendant was an armed camp guard at Treblinka); United States v. Tittjung, 753 F. Supp. 251 (E.D. Wisc. 1990), aff'd, 948 F.2d 1292 (7th Cir. 1991) (finding that the defendant's service as an armed concentration camp guard was clearly and convincingly documented by an SS-prepared roster).

B. Service as an Armed Concentration Camp Guard is Persecution Within the Meaning of the Act

In Fedorenko v. United States, 449 U.S. 490 (1981), the Supreme Court held that service as an armed concentration camp guard, whether voluntary or involuntary, was assistance in

[8] At his denaturalization trial, the respondent did not object to the documentary evidence on authentication grounds, but the transcript of proceeding reflects that the issue of the authenticity and reliability of the SHAEF card and transfer lists was fully litigated.

persecution for purposes of the Displaced Persons Act of 1948 ("DPA").[9] The Court explained that the omission of the word "voluntary" from the definition of "displaced person" under the DPA "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." Id. at 512. However, to address the concern of the district court below that this interpretation of the term "assisted" could exclude survivors who had been forced to assist the SS in the operation of the camps, the Court stated that the focus should be on:

> whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems . . . .

Id. at n.34. Based on this language, the Sixth Circuit indicated in Petkiewytsch v. INS, supra, that a showing of some personal involvement in acts of persecution was necessary to sustain a finding of assistance in persecution.[10]

1. Petkiewytsch

In Petkiewytsch, the court reviewed the legislative history of section 241(a)(4)(D) of the Act and found that it differed from the DPA in that its purpose was to reach Nazi war criminals. Id. at 879-80. To the court, language included in the legislative history "appear[ed] to require active participation in persecution going beyond 'assistance.'" Id. at 880. Focusing on Petkiewytsch's

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[9] The DPA provided immigrant visas for European refugees after World War II. Section 2(b) of the DPA provided: "'Displaced person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the International Refugee Organization ("IRO") Constitution, in turn, excluded from the definition of "refugee or displaced person" any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Section 13 of the DPA, as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950), specified that "[n]o visas shall be issued . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."

[10] We note that this conclusion was also reached by the United States Courts of Appeal for the Second and Ninth Circuits in United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985), and Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), respectively. However, as both Sprogis and Laipenieks involved policemen, not camp guards, we consider them inapposite to this case. See generally United States v. Sprogis, supra, at 121 (noting that Sprogis' case "obviously falls between the extremes of the death camp barber and the weapon wielding guard and presents the difficult problem of where to draw the line").

"particular conduct," as instructed by the Supreme Court, the court observed that he did "not fit the description of a 'Nazi war criminal' . . . ." Id. at 881. The court concluded that, "[g]iven all the circumstances" of the case, Fedorenko did not require a finding that Petkiewytsch was deportable under the Holtzman Amendment. Id.

However, as the court emphasized, Petkiewytsch was a civilian guard at a labor education camp who, following the war, was apprehended by the British as a suspected war criminal, but then released "under 'category 5,' which meant that he was totally exonerated of any wrongdoing and of all charges against him." Id. at 873. Labor education camps were the "least punitive of all types of Nazi camps." Id. at 881. No fence surrounded the Kiel-Hasse camp in Germany, where Petkiewytsch served. Id. at 874. While physical abuses, malnutrition, and overcrowded conditions were prevalent, prisoners typically were incarcerated for a period of just 56 days. Id. Moreover, the beatings and other such acts of persecution experienced by the prisoners were "primarily at the hand of SS guards present at the camp and more senior Gestapo officials rather than at the hand of civilian guards" like Petkiewytsch. Id. The court also considered the undisputed evidence that Petkiewytsch's refusal to serve would have subjected him to imprisonment or execution and that, on one occasion, Petkiewytsch was in fact imprisoned for failing to perform his guard duties diligently. Id. at 872-73, 881. Therefore, Petkiewytsch's case presented the difficult line-drawing problems referred to by the Supreme Court. Id. at 878.

2. The Nature of Concentration Camps, Particularly Auschwitz

In contrast, the respondent before us served at the Auschwitz and Sachsenhausen concentration camps and on prisoner transports between these and other concentration camps. As the court in Petkiewytsch observed, concentration camps were the "most repressive [of the] Nazi camps." Id. at 873. Some of these camps, including Auschwitz, were extermination camps, "intended and used solely to eliminate Jews and other groups of people deemed inferior by the Nazis." Id.

The record reflects that the concentration camp system was operated by the SS as a means of enforcing the Nazi dictatorship of Adolf Hitler. As noted above, the respondent's misrepresentations regarding his wartime service were considered material by the district court because of the horrible mistreatment of prisoners at the concentration camps to which he was assigned. United States v. Hammer, supra. According to Dr. Sydnor and the documentary evidence of record, the horrible mistreatment at concentration camps generally included the execution or indefinite detention, referred to as "protective detention," of political and religious opponents of the Nazi regime or anyone else suspected of undermining the German war effort. Unless executed upon arrival, prisoners deemed racially or politically dangerous to the Germans were subjected to "extermination through work" at the camps. "Extermination through work" meant that prisoners were worked to death through slave labor. At Auschwitz, due to inadequate nutrition, prisoners were usually completely emaciated within a short period of their arrival. Prisoners were also subjected to inhuman living conditions, corporal punishment, torture, and medical experimentation.

Those arrested and sent to concentration camps included Protestant and Catholic clergymen, Jehovah's Witnesses, Russians, Ukrainians, Czechs, Poles, Gypsies, Communists, and, of

course, Jews. An order issued on March 9, 1940, by Heinrich Himmler, the Reichsführer, or leader, of the SS and Chief of the German Police, specifically banned the release of "all Jewish protective detainees in the concentration camps for the duration of the war." Subsequently, Auschwitz, as an extermination camp, played an important role in the implementation of the so-called "Final Solution of the Jewish Question," which was the decision by Nazi leaders to exterminate the Jews in Europe. By the summer of 1944, most of the new arrivals at Auschwitz were selected for extermination in the gas chambers shortly after detraining. For instance, between May 1944 and October 1944 alone, approximately half a million Hungarian Jews were murdered upon their arrival. Arriving prisoners who survived the initial selections became slave laborers.

At the respondent's denaturalization trial, two concentration camp survivors gave testimony describing their own painful experiences at Auschwitz. Though both stories are poignant, we need only focus on the testimony of one of the survivors to illustrate the truly horrible nature of that camp. Professor Thomas Buergenthal was born in Czechoslovakia on May 11, 1934. He was sent to Auschwitz in the summer of 1944, at the age of 10. The camp was enclosed by electric barbed wire, and there were also armed guards, dogs, and guard towers. Upon his arrival, he was separated from his mother, whom he saw on only one occasion thereafter. He and his father were taken to a building called a "sauna," where they had their hair shaved off and were otherwise "disinfected." They were later tattooed with identification numbers. Professor Buergenthal's number started with a "B" as in boy. On his prison uniform, Professor Buergenthal wore a yellow triangle, which signified that he was a Jew. Most of the triangles he saw at Auschwitz were yellow. While living and working as an errand boy within the camp, Professor Buergenthal witnessed other prisoners being beaten and effectively chased into the electric wires. He also saw the crematoria, which emitted a large amount of smoke and a very unpleasant odor. At one point, he heard screams coming from the gas chambers.

When asked to recount a typical day at Auschwitz, Professor Buergenthal said that the thing he remembers the most was that he and the other prisoners were always hungry. They were made to subsist on substitute coffee and a piece of bread at daybreak and soup and rotten bread at the end of the day. Most of the prisoners were very thin and underweight, some extremely so.

In October or November of 1944, Professor Buergenthal was separated from his father during a selection. His father was ultimately transferred to Flossenbürg, where he reportedly was shot 3 days before the end of the war. Professor Buergenthal was placed in a holding barracks to await being sent to the gas chambers. In trying to escape from the barracks to avoid the gas chambers, he was beaten. One morning, though, he awoke to find the other prisoners in the barracks gone. He believes that a Polish doctor saved his life.

Professor Buergenthal was evacuated out of Auschwitz in January 1945. During the transport, he and other prisoners were forced to march for about 3 days before they were put on trains en route to Sachsenhausen. At Sachsenhausen, two of his toes were amputated due to frostbite. As the Russians continued their advance, he was left in the infirmary and eventually liberated at the end of April 1945, an orphan less than a month shy of his 11th birthday. Neither Professor Buergenthal nor Bernice Shapiro, the other survivor, was aware of any reason for their confinement by the Nazis other than that they were Jewish.

3. Service as an SS guard

In his appellate brief, the respondent queries, as did the dissent in United States v. Kowalchuk, 773 F.2d 488, 513 (3d Cir. 1985), whether a baker who delivered bread to a Nazi-organized militia or janitor who cleaned offices at militia headquarters can be said to have assisted in persecution. This issue does not concern us here, because the respondent was not a baker or a janitor. See generally United States v. Kairys, supra, at 1378 ("Although the Supreme Court notes that Fedorenko had testified to shooting in the direction of escaping prisoners, this was to distinguish Fedorenko's position as a camp guard from those concentration camp survivors who were forced to perform tasks within the camp."). The respondent was not a civilian at all, nor even a prisoner-of-war turned guard, as was Fedorenko. He joined the Waffen SS in October 1942[11] and, by December 1944 at the latest, was assigned to the Death's Head Battalion at Auschwitz.[12]

The record reflects that SS Death's Head Battalion guards served the purpose of preventing prisoners from escaping and ensuring that prisoners did their work. They wore a skull and crossbones on the collar of their uniforms and were armed with weapons such as rifles with bayonets and, in some cases, German Shepherds trained to watch, attack, and kill. Their duties included guarding the wire perimeters of the camps, the protective custody compounds wherein the prisoners' barracks were located, and the work details of prisoners inside the camps or at adjacent industrial or agricultural labor sites. SS guards also escorted prisoners who were transferred from one concentration camp to another.

At the concentration camps, SS guards were under orders to shoot at any prisoner who attempted to escape. See generally United States v. Breyer, 41 F.3d 884, 890 (3d Cir. 1994)

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[11] Incidentally, Dr. Sydnor's testimony and the documents he identified and explained indicate that by October 1942, the Croatian government and the German Foreign Ministry had reached an agreement allowing for only the recruitment of eligible *volunteers* from the ethnic German population in Croatia. Thus, while the SS was very aggressive in its recruitment of ethnic Germans, and put a lot of pressure on individuals and their families, the SS had no legal authority to conscript an ethnic German in Croatia at the time that the respondent joined the Waffen SS. We note that at the deportation hearing, the respondent submitted a document to indicate otherwise, but the Chief Immigration Judge found that the document was not properly authenticated, and the respondent has not challenged this finding on appeal. We also note that the document refers to agreements in 1942 and 1943 for the induction, but not necessarily the conscription, of ethnic Germans in Croatia.

[12] According to Dr. Sydnor, SS recruits assigned to concentration camps were generally those who were deemed unfit for combat service, but refusing a concentration camp assignment did not result in execution. Rather, such recruits were deployed to perform tasks such as guarding bridges, doing rural police work, or in extreme cases, clearing minefields or defusing bombs. An SS guard who refused to carry out his duties once he was already assigned to a concentration camp would have been punished and probably transferred, but Dr. Sydnor was unaware of any documented instance in the historical records of an SS guard being court-martialled and shot for refusing guard duty at a concentration camp.

(finding assistance in persecution where the defendant "was a trained, paid, uniformed armed Nazi guard who patrolled the perimeters of two [concentration] camps with orders to shoot those who tried to escape"). Moreover, any SS guard at Auschwitz would have known that it was an extermination camp. Indeed, when trains of Jewish prisoners arrived at the Birkenau death camp within the Auschwitz complex, SS guards were assigned to "ramp duty" on an as need basis to secure the area to allow the selections to take place.

Dr. Sydnor testified that on prisoner transports such as the transport from Auschwitz to Sachsenhausen during the evacuation of Auschwitz, SS guards were under orders to shoot not only those who attempted to escape, but also those who could not keep up the pace set for marching. We note in this regard that, although the evacuation of Auschwitz took place in January during a winter that was very cold, the prisoners were not given adequate clothing or proper footwear for marching. We also recall Professor Buergenthal's frostbite and the evidence of severe malnourishment among the prisoners.

The record includes no evidence to indicate that the respondent was ever disciplined by his Nazi commanders for any dereliction of his duties as a guard at the camps or on the transports. Likewise, despite the creation of the SHAEF card, we find no evidence that the respondent was ever taken into custody by Allied authorities as a suspected war criminal and then released upon being exonerated of any wrongdoing. Rather, we note that the rank of Sturmmann was not an entry-level rank, and thus, the respondent was likely in a supervisory position over a small number of other SS guards. Dr. Sydnor also testified that the fact that the respondent was assigned to the 1st Company of the Death's Head Battalion at Auschwitz indicates that he served at the main camp at Auschwitz, where guards with experience were transferred.

4. Conclusion

In short, unlike Petkiewytsch, this case presents no line-drawing problems. "Service as an armed guard . . . ensured the systematic destruction of concentration camp inmates." United States v. Schmidt, 923 F.2d 1253, 1259 (7th Cir. 1991).

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. INS, supra, at 943; see also United States v. Koreh, 59 F.3d 431, 442 (3d Cir. 1995) (finding that assistance in persecution does not require "personal participation . . . in the commission of physical atrocities."); Kulle v. INS, 825 F.2d 1188, 1193 (7th Cir. 1987) (explaining that in deportation cases, the "proof is directed toward showing presence at a place of persecution, and 'assistance' in persecution is inferred from the circumstances); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985) (holding that the term "persecution" includes the confinement of political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, Jews, and other opponents of the Nazi regime at the Gross-Rosen concentration camp); Matter of Fedorenko, supra, at 69 (finding that "the objective effect of the respondent's conduct as a perimeter guard would have been to aid the Nazis, in some small measure, in their confinement

and execution of Jewish prisoners at Treblinka").

In his closing argument before the Chief Immigration Judge, even the respondent conceded that the Nazis committed atrocities during World War II. On appeal, he makes reference to the Holocaust, "the worst genocide of the modern era, if not of all time." In view of the evidence of what amounts to the systematic persecution of persons because of race, religion, national origin, and political opinion under the concentration camp system, particularly at the Auschwitz concentration camp, a primary instrument of the Holocaust, we find that by simply "impeding [prisoners'] escape through his presence" as an armed SS Death's Head Battalion guard, cf. Petkiewytsch v. INS, supra, at 873, the respondent was actively and personally involved in persecution to a sufficient extent to fall within the scope of the Holtzman Amendment.

We emphasize that, under the plain language of the statute itself, an alien is deportable if he merely "assisted" in the persecution of others. See Matter of Kulle, supra, at 332; Matter of Fedorenko, supra; see also Kalejs v. INS, supra, at 444 ("The Holtzman Amendment's non-criminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war."). As the objective effect of an alien's actions, not his motivation and intent, controls in determining whether he "assisted" in persecution, the voluntariness of his actions is irrelevant. Matter of Fedorenko, supra, at 69-70; see Fedorenko v. United States, supra, at 512; United States v. Breyer, supra; United States v. Schmidt, supra, at 1257-58; Maikovskis v. INS, 773 F.2d 435, 445-46 (2d Cir. 1985); see also Matter of Kulle, supra ("Congress intended that all who assisted the Nazis in persecuting others must be deported regardless of the degree of voluntariness of such assistance.").

Thus, based on the respondent's wartime service as an armed concentration camp guard, particularly his service at Auschwitz, we find him deportable under section 241(a)(4)(D) of the Act. We note, as did the Chief Immigration Judge, that the respondent's deportability under section 241(a)(4)(D) of the Act renders him ineligible for any relief from deportation. Moreover, we find no evidence that any country other than Croatia was ever designated for deportation by either party or the Chief Immigration Judge. Therefore, we find that the respondent was correctly ordered deported from the United States to Croatia, the country of his birth. See section 243(a)(3) of the Act, 8 U.S.C. § 1253(a)(3).

V. FAIR HEARING

On appeal, the respondent also raises a fair hearing claim. He asserts that the Chief Immigration Judge "showed improper bias and should be reversed because he disregarded the district court's findings when he mischaracterized the respondent's testimony, and he applied his own moral standards to assess the respondent's actions during World War II." We find no evidence whatsoever to support this assertion, which is virtually identical to a passage appearing in Matter of Fedorenko, supra, at 72. Indeed, the Chief Immigration Judge and the district court were in agreement as to the credibility of the respondent's testimony, and unlike the Immigration Judge who presided over Fedorenko's case, the Chief Immigration Judge in this case did not make any ill-advised comments about the respondent's character and motivations.

Additionally, we note that the Chief Immigration Judge was generally quite lenient with the

respondent. After having stipulated that he was a guard in the 1st Company of the SS Death's Head Battalion at Auschwitz, the respondent was permitted at the hearing to change his plea and deny this allegation. At the conclusion of the hearing, over the Government's objection, the respondent was permitted to submit an unauthenticated document despite his noncompliance with the Chief Immigration Judge's pre-hearing orders.

The only adverse procedural ruling the respondent identifies, other than the ruling on the admissibility of the Government's evidence, is the Chief Immigration Judge's decision to delay his ruling on the respondent's "Special and Affirmative Defenses." However, our review of the transcript of the hearing reveals that the respondent raised no objection to the Chief Immigration Judge's conduct of the hearing. See generally Matter of Edwards, 20 I&N Dec. 191, 196 n.4 (BIA 1990) (noting that it is inappropriate to raise an objection for the first time on appeal). In any event, we find that the respondent has failed to show how he was prejudiced by the delay or any other perceived deficiency in the proceedings. See, e.g., Matter of D-, supra; see also Matter of Fedorenko, supra, at 73 (rejecting the respondent's fair hearing claim where he failed to show prejudice).

We lack the authority to review the Government's decision to institute deportation proceedings against the respondent. E.g., Matter of U-M-, 20 I&N Dec. 327, 333 (BIA 1991); see also United States v. Peoples Household Furnishings, Inc., 75 F.3d 252, 256 (6th Cir. 1996) (observing that the "nullum tempus rule," or rule that the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitations is a federal common law rule); Matter of Garcia-Linares, Interim Decision 3268, at 11 (BIA 1996) (noting that "there is no 'statute of limitations' in deportation proceedings"); Matter of Sparrow, 20 I&N Dec. 920, 923 (BIA 1994) ("Laches or neglect of duty on the part of officers of the Government generally may not be invoked against the Government when it acts to enforce a public right or protect a public interest."). Likewise, it is not within our province to rule on the validity of the statutes and regulations we administer. E.g., Matter of Hernandez-Puente, 20 I&N Dec. 335, 339 (BIA 1991). We further note, as did the Chief Immigration Judge, that the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder and other such challenges to the Holtzman Amendment. See, e.g., Schellong v. INS, supra, at 662-63. Lastly, having addressed the issue of the admissibility of the Government's evidence, we emphasize that we must affirm the Chief Immigration Judge's order of deportation against the respondent, because the evidence, together with the denaturalization judgment, sustains the charge. See, e.g., Matter of Roussis, 18 I&N Dec. 256, 258 (BIA 1982).